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# In the Supreme Court of the United States

October Term, 1942.

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**HERBERT FREDERIC MILLER, *Petitioner,***

*vs.*

**ELSIE A. MILLER, *Respondent.***

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**Petition for Writ of Certiorari, and Brief in  
Support Thereof.**

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IN THE SUPREME COURT OF THE UNITED STATES.  
*October Term, 1942.*

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No. \_\_\_\_\_  
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HERBERT FREDERIC MILLER, *Petitioner,*

*vs.*

ELSIE A. MILLER, *Respondent.*

\_\_\_\_\_  
PETITION FOR WRIT OF *CERTIORARI* TO THE CIR-  
CUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.  
\_\_\_\_\_

*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

I.

**Summary and Short Statement of Matter Involved.**

Respondent filed this suit in the United States District Court for the Northern District of Oklahoma against petitioner, her former husband, to recover upon an alleged separate maintenance agreement. Petitioner's motion to dismiss was sustained by the trial court, Judge SAVAGE presiding, upon the ground, among others, that the asserted right or claim had been previously adjudicated upon the merits in a prior suit between the same parties in the District Court of Tulsa County, Oklahoma, affirmed by the Supreme Court of Oklahoma (*Miller v. Miller*, 186 Okl. 566, 99 P. (2d) 515, *certiorari* denied 311 U. S. 645). On appeal

by respondent to the Tenth Circuit Court of Appeals, the judgment of the District Court was reversed. By stipulation of the parties both the trial and appellate courts took judicial notice of the proceedings in the state court case which were incorporated into the record. (R. 13)

The Circuit Court of Appeals decided (R. 97) that

- (1) "the alleged separation agreement between the parties was pleaded in the Oklahoma court as a valid agreement, subject to the approval of a court of competent jurisdiction."
- (2) Respondent did not seek to recover on the contract "except in so far as it constituted a 'guide' and for the persuasive effect to which it was legally entitled in the determination of the equitable issue of alimony incidental to the divorce, which the Oklahoma court undoubtedly has the equitable power and the duty to adjudge." (R. 97)
- (3) Such preexisting contract was not extinguished by the state court decree.

Respondent and petitioner were married in 1911 and lived together as husband and wife until their separation June 1, 1920, at which time they were living in New Jersey. June 30, 1920, they entered into a written separation agreement (R. 5) which provided for support and maintenance of respondent and their daughter, born May 21, 1916. By the terms of said agreement, petitioner agreed:

- (1) To convey the home in New Jersey, free of encumbrance, to respondent.
- (2) To execute a bill of sale to respondent covering all household furniture, furnishings, all other personal property then upon said real estate and premises.
- (3) To pay respondent \$50.00 per week from July 1, 1920, to July 1, 1923.

Respondent agreed to accept the foregoing provisions in full of alimony and for support and maintenance of herself and daughter until July 1, 1923.

It was further agreed that on or before June 1, 1923, the parties would agree, if possible, as to provision to be made by petitioner for support and maintenance of respondent and daughter after July 1, 1923.

By letter of petitioner to respondent of May 24, 1923, after respondent had obtained a divorce decree *nisi* in New Jersey, petitioner stated:

- (1) That he might possibly wish to remarry during the summer, that this was permissible under the laws of a number of states in spite of fact that the six months' period in New Jersey would not elapse until November 2nd, and asked respondent to advise him that he need expect no detrimental action on her part should he remarry before expiration of six months required by New Jersey law.
- (2) "Commencing with July, I expect to increase my allowance to you and Elsie Julia from \$216.66 a month, the present rate, to \$250.00 a month, and I hope that no further legal matters will be raised which might prevent my being able to continue to send you this amount. This, of course, rests in your hands."

Counsel for respondent in letter of May 29, 1923 (R. 8), replying to petitioner's letter advised that his client had no intention of doing anything whereby the final decree of divorce would be interfered with and stated:

"We might add in regard to the monthly payments, that while we had no definite arrangement when these payments were to begin, we thought they would start when the understanding was reached with your solicitor."

The divorce, which was obtained by publication service on petitioner who then resided in Oklahoma, made no reference to alimony or property settlement.

Petitioner paid to respondent \$250.00 per month to June, 1932, and paid lesser sums per month until May, 1937, when the child became 21 years of age, and thereafter made no further payments. The total amount paid, together with the value of the real estate and personal property which petitioner conveyed to respondent, aggregated the sum of \$58,867.74. (*Miller v. Miller*, 186 Okl. 566, 567, 99 P. (2d) 515, 517.)

***State Court Case of Miller v. Miller:***

On May 29, 1937, respondent as plaintiff sued petitioner as defendant in the District Court of Tulsa County, Oklahoma, alleging the marriage, the birth of the daughter, the separation agreement, the subsequent divorce, the circumstances of the parties on the issue of alimony and also pleaded the alleged contract of June 30, 1920, and letters of May 24 and 29, 1923, the same alleged contract sued on in the instant case, and alleged that the original contract, supplemented by the aforesaid letters, "do not become and are not binding agreements as contracts unless and until approved by a court of competent jurisdiction \* \* \*" and that "the plaintiff is entitled to have said alimony contracts approved and to have alimony awarded to her in accordance therewith or equivalent thereto, and such additional alimony and division of property as is reasonable and just," and prayed "that said alimony agreements above referred to be approved by the court and that she be awarded alimony in the amount therein agreed upon by and between the plaintiff and the defendant and for such additional ali-



mony and a division of property as may be just," and her attorney fees, costs, and general relief. (R. 35)

The trial court found that by reason of the total sum theretofore paid to plaintiff, defendant had fully performed his duty and obligation with respect to alimony and property rights and for support and maintenance of their minor child, and entered judgment for the defendant.

On appeal to the Supreme Court of Oklahoma plaintiff unsuccessfully contended that she was entitled "to recover judgment on the written maintenance, alimony agreement and property settlement contract." (*Miller v. Miller*, 186 Okl. 566, 99 P. (2d) 515-518.)

The Supreme Court found that defendant had paid plaintiff in property and money an amount approximately equivalent to the total financial worth of both the parties at the time of the divorce and affirmed the judgment of the trial court except with respect to allowance of costs and attorney's fees. In remanding the case to the trial court, the Supreme Court said:

"The trial court is therefore directed, upon a hearing *for that purpose only*, to ascertain the reasonable and necessary expenses incurred by the plaintiff in this litigation including a reasonable attorney's fee and enter judgment for the payment thereof.

"Subject to the foregoing modification the decision of the trial court is affirmed." (Italics ours.) (186 Okl. 566, 571, 99 P. (2d) 515, 520.)

Plaintiff applied to the Supreme Court of the United States for *certiorari* to the Supreme Court of Oklahoma and as one of the reasons for granting the writ relied upon the denial by the Supreme Court of Oklahoma of plaintiff's rights of recovery on the alleged postnuptial contracts.

(Pages 14, 15, 19, petition for *certiorari*, *Miller v. Miller*, October Term 1940, No. 83, of which this Court will take judicial notice.) *Certiorari* was denied, 311 U. S. 645.

## II.

### **Basis Upon Which It Is Contended That This Court Has Jurisdiction.**

(1) This petition for *certiorari* is prosecuted pursuant to the provisions of Section 24<sup>9</sup> of the Judicial Code as amended. (Title 28, Sec. 347, U. S. C. A.)

(2) The opinion (R. 93) and decree (R. 104) of the Circuit Court of Appeals sought to be reviewed were filed on March 5, 1943. Petition for rehearing was filed April 2, 1943 (R. 105), and the court entered an order denying such petition on the 19th day of April, 1943 (R. 107), PHILLIPS, J., dissenting.

## III.

### **Questions Presented.**

The questions presented by this petition are,

(1) whether the court below was required to follow decisive and controlling decisions of the Supreme Court of Oklahoma;

(2) whether there are controlling and decisive cases by the Supreme Court of Oklahoma which the court below failed to follow, and

(3) if so, is the matter of such importance as to warrant this Court in granting *certiorari*.

#### IV.

##### **Reasons Relied Upon for Allowance of the Writ.**

There are special and important reasons for the allowance of the writ which will appeal to the sound judicial discretion of this court. These are:

(1) The court below overlooked the doctrine and policy laid down in *Erie R. Co. v. Tompkins*, (304 U. S. 64, 82 L. ed. 1188) and the subsequent cases uniformly in accord with that doctrine and policy, construing Section 34 of the Judiciary Act of 1789, as amended. (28 U. S. C. A. 725)

(2) The court below decided important questions of local and general law in conflict with controlling decisions of the highest court of Oklahoma.

The court's opinion that the determination of the issue of alimony by the Oklahoma Court, with the alleged contract pleaded and offered in evidence on that issue, did not extinguish the contract is based upon general text books and conflicting decisions from other states and is in conflict with the decision of *Miller v. Miller* by the Supreme Court of Oklahoma and with uniform decisions of that court both before and after *Miller v. Miller*.

The effect of this decision is to set up within the state two divergent and conflicting systems of law, one to be applied in the state courts, the other to be availed of in the United States Courts in diversity of citizenship cases. This decision disrupts uniformity in the administration of the law within the state, which uniformity, by the doctrine and policy announced in the *Erie R. Co.* case, this court has consistently sought to achieve.

Wherefore, your petitioner prays that this court issue a writ of *certiorari* to the United States Circuit Court of

Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Tenth Circuit had in case numbered and entitled on its docket No. 2568, *Elsie A. Miller, Appellant, v. Herbert Frederic Miller, Appellee*, to the end that this cause may be reviewed and determined by this court as provided by the Statutes of the United States, and that the judgment and decree herein of the said United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this court and for such further or other relief as to this court may seem proper.

Respectfully submitted,

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